

ROCENDO M. CENICEROS
Claimant

WINTER FEED YARD, INC.
Respondent

FIREMAN'S FUND INSURANCE COMPANY
Insurance Carrier

ORDER

Claimant appeals the November 19, 2002 preliminary hearing Order of Administrative Law Judge Pamela J. Fuller. Claimant was denied any benefits associated with an alleged head and neck injury from an October 29, 2001 accident suffered while claimant was employed with respondent.

Claimant raises the following issues on appeal:

- “(1) The Administrative Law Judge erred in not finding that the claimant suffered an accidental injury to his head on October 29, 2001 with resulting medical problems.
- “(2) The Administrative Law Judge erred in not finding that the injury to the claimant’s head arose [sic] out and in the course of his employment.
- “(3) The Administrative Law Judge erred in failing to find that the Respondent provided timely notice of his head injury.
- “(4) The Administrative Law Judge erred in failing to review a critical deposition taken on November 5, 2002 of Mr. Emmett Airstup [sic], which deposition was taken by agreement of the parties. Further, that by agreement of the parties the Administrative Law Judge was asked

to hold in abeyance her decision until its receipt, or no later then [sic] November 30, 2002.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant suffered accidental injury on October 29, 2001, when the horse on which he was riding reared, falling over backwards, pinning claimant to the ground and injuring his right shoulder and arm. Claimant was freed from the horse and, shortly thereafter, transported to the Western Plains Medical Complex emergency room. At that time, claimant complained of right shoulder and elbow problems. An examination at that time proved normal with the exception of the shoulder and arm. Claimant's neurological tests were all normal. There was no indication of head or neck pain, and claimant's range of motion in his neck was recorded as normal. When asked, claimant denied that he had been hit in the head.

Claimant was referred for ongoing medical treatment to Guillermo E. Garcia, M.D., in Dodge City, Kansas. Through a series of examinations and tests, it was determined that claimant had suffered a right shoulder rotator cuff tear at the time of the accident. Claimant underwent rotator cuff surgery on December 4, 2001, with Dr. Garcia. After a period of physical therapy, post surgery, claimant ultimately returned to work for respondent with his initial return to work being at light duty.

The dispute in this matter centers around the extent of claimant's injuries suffered on October 29, 2001. Respondent contends claimant's injury was limited to his right shoulder and arm, with the appropriate treatment being provided. Claimant, however, contends that he also suffered a traumatic closed head injury at the time of the accident. The Administrative Law Judge determined that respondent's evidence was the more persuasive, finding claimant did not prove he suffered an injury to his head on the date of accident. The Board concurs with the Administrative Law Judge's findings.

The Board acknowledges a significant dispute in the record regarding what injury claimant may have suffered and regarding claimant's personality and physical changes alleged to have occurred after the October 29, 2001 accident. Respondent's witnesses testified that claimant did not suffer a head injury, and was coherent and communicative shortly after the accident. The medical records contemporaneous with the accident and during the follow-up treatment also fail to indicate any type of head or neck complaints.

Respondent's witnesses do acknowledge that on approximately January 26, 2002, claimant came to work and began acting strangely, including crying and exhibiting what

appeared to be confusion. Claimant was examined at the Western Plains Medical Complex emergency room on February 1, 2002. The records at that time indicated confusion and agitation, with a notation stating that claimant's condition had started approximately five days before, which would coincide with the January 26 date testified to by respondent's witnesses. Claimant was ultimately admitted to Larned State Hospital on February 4, 2002, and remained there for three weeks until his discharge on February 25, 2002.

The February 1, 2002 emergency room record is the first indication of any injury associated with claimant's head or neck. The medical records after February 1, 2002, include discussions regarding headaches, head injuries and post-concussion syndrome, none of which preexisted that date.

An additional item of concern for the Board is claimant's testimony and the testimony of his family members that he suffered some type of eye injury when struck by the horse. There is no indication in the emergency room records or any other medical records of any type of eye injury. In fact, the medical records which do discuss claimant's eyes indicate a finding of equal and reactive pupils, with no indication of any type of damage.

Claimant was referred to Bernard M. Abrams, M.D., a specialist in neurology and in electroencephalography and electromyography, on July 22, 2002. Both with Dr. Abrams and while at Larned State Hospital, claimant underwent numerous neurological examinations, all of which were determined to be normal.

Dr. Abrams, in his summary, determined that if claimant suffered a head injury, then he was experiencing "postconcussional" symptoms, with his psychotic state the result of the head injury. If, however, claimant suffered no head injury on October 29, 2001, then the diagnosis would not be tenable and claimant's psychotic state would be due to something else.

In reviewing the multitude of depositions which directly conflict with each other regarding not only claimant's injuries suffered on October 29, but also the activities of claimant afterwards, the Board finds the most persuasive evidence to be the medical records obtained at the emergency room and during the treatment claimant underwent after the October 29, 2001 accident. No record contains a mention of a head or neck injury or head or neck complaints until claimant was admitted to the emergency room with the psychotic symptoms on February 1, 2002. Medical records from the Area Mental Health Center dated March 4, 2002, discuss claimant's head symptoms and indicate a head injury suffered three to four years before, without a detailed history.

The Board concludes that claimant has failed to show a connection between his psychotic episode, including the admission into the Larned State Hospital, after

January 26, 2002, and the October 29, 2001 accident with respondent. Therefore, the Order by the Administrative Law Judge denying claimant benefits for those alleged injuries is affirmed.

With regard to claimant's allegation that the Administrative Law Judge failed to review a critical deposition of Emmett Aistrup, the Board finds this issue from a preliminary hearing is not reviewable. The Board is limited in its ability to review issues from a preliminary hearing appeal to those which involve whether claimant suffered accidental injury, whether claimant's accidental injury arose out of and in the course of employment, whether notice is given or claim timely made, or whether certain defenses apply.¹ The Administrative Law Judge's control of her docket is well within her jurisdiction. In this instance, one deposition of Mr. Aistrup had already been taken, with the parties for unknown reasons determining that a follow-up deposition was required on November 5, 2002. The Administrative Law Judge waited from November 5, 2002, until November 19, 2002, to issue the decision which is well beyond the five-day limit set in K.S.A. 44-534a. Any agreement between the parties regarding how long the Administrative Law Judge should wait before issuing her decision would not be binding upon the Administrative Law Judge. The Board, therefore, finds the issue dealing with the November 5, 2002 deposition of Mr. Aistrup to be outside of its jurisdiction and claimant's appeal regarding that issue is dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller dated November 19, 2002, should be, and is hereby, affirmed. As is always the case, preliminary awards are not binding in a full hearing on the claim, but are subject to a full presentation of the facts.

IT IS SO ORDERED.

Dated this ____ day of January 2003.

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation

¹ See K.S.A. 44-534a.